85-1369

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BERNARD ZOLDESSY,
Petitioner,

vs.

FOUNDERS TITLE COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When does the Statute of Limitations begin to run on a civil RICO claim?

2. Did the Court of Appeals err in ruling that the District Court was in error in instructing the Jury that the Statute of Limitations began to run after the commission of the last predicate act (mail fraud or wire fraud) in a civil RICO case?

3. Does the action of the Court of Appeals in vacating the Judgment rendered by the District Court in favor of Plaintiff Bernard Zoldessy and against Defendant Founders Title Company effectively deny Zoldessy's constitutional right to a trial by jury in contravention of Amendment VII of the Constitution of the United States?

4. Did the Court of Appeals deprive Zoldessy of his constitutional right of trial by Jury under Amendment VII of the United States Constitution in ruling as a matter of fact that Zoldessy learned he had been deceived by mid-January, 1982, and his RICO claim was thus time-barred?

5. Did the Court of Appeals err in failing to remand this cause to the District Court for a Jury determination as to whether Zoldessy's RICO claim was prosecuted within a year after the Statute of Limitations began to run?

LIST OF PARTIES TO PROCEEDINGS

Plaintiff: Bernard Zoldessy
Umphrey H. Bowling, Jr.
Harold Williams

Defendants: Founders Title Company, a Corporation

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BERNARD ZOLDESSY,
Petitioner,

VS.

FOUNDERS TITLE COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

REPORTS AND OPINIONS DELIVERED BELOW

A. Opinion of United States Court of Appeals for Eleventh Circuit rendered October 15, 1985. (Appendix C)

B. Memorandum Opinion of United States District Court, Middle District of Alabama, in case of Umphrey H. Bowling, Jr., Harold Williams, Plaintiffs, v. J. R. Buderus, Buderus Family Trust, Founders Title Company, a Corporation, Defendants. Bernard Zoldessy, Plaintiff, v. J. R. Buderus, Buderus Family Trust, Founders Title Company, Defendants, dated April 4, 1984. (Appendix A)

C. Judgment of United States District Court, Middle District of Alabama, dated April 4, 1984, in Civil Action No. 83-H-993-N. (Appendix B)

D. Judgment and Mandate of Court of appeals, Eleventh Circuit, dated October 15, 1985, and December 3, 1985, respectively. (Appendix G)

E. Order of United States Court of Appeals, Eleventh Circuit, denying Zoldessy's Petition for Rehearing, dated November 19, 1985. (Appendix D)

F. Notice of Appeal to the United States Supreme Court by Bernard Zoldessy, dated February 4, 1986. (Appendix E)

G. Memorandum Opinion and Order of District Court, Middle District of Alabama, dated January 6, 1986. (Appendix H)

JURISDICTION

This Petition seeks review of the Decision and Judgment of the United States Court of Appeals, Eleventh Circuit, dated October 15, 1985, and entered on the same day. Petition for Rehearing filed by Plaintiff Bernard Zoldessy was denied by the Circuit Court by its Order of November 19, 1985, entered on that day. Plaintiff thereafter filed his Notice of Appeal on the 4th day of February, 1986.

The jurisdiction of this Court is invoked under the provisions of 28 USC 1254(1) and 28 USC 2101(c).

Further, the Petition invokes jurisdiction of the Court on the grounds that this federal court of appeals has rendered a decision in conflict with other courts of appeals on the same matter; that it has decided a federal question in conflict with Alabama Supreme Court decisions and its ruling has abridged Petitioner's Amendment VII right to a trial by jury under the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

A. Amendment VII to the Consitution of the United States:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

B. Section 6-2-39 of the Code of Alabama of 1975 in effect as of the date of the final judgment rendered in this case by the United States District Court for the Middle District- this Statute is reprinted verbatim as Appendix F hereto. The Statute prescribes a one year Statute of Limitations for the purposes of this Appeal as to Plaintiff Zoldessy's claim.

C. The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USC 1961, et seq., forms the basis of one of the claims of Plaintiff Bernard Zoldessy which alleges numerous acts of wire fraud (18 USC 1343) and numerous acts of mail fraud (18 USC 1341); however, the verbatim provisions of these acts are not direct issues involved in this appeal and, in the interest of brevity, are not printed here.

STATEMENT OF THE CASE

Plaintiff Bernard Zoldessy, an Alabama farmer, brought an action against Founders Title Company, a California corporation, alleging Civil RICO violations and common-law fraud. Jurisdiction was based on diversity of citizenship and the amount in controversy under 28 USC 1332(a). The action was consolidated with that of two real estate agents against the same Defendant. The facts were tried before a jury in the District

Court for the Middle District of Alabama. The jury found a verdict in favor of the Plaintiff for $25,000, trebled under the act to $75,000, and this Court awarded the Plaintiff the additional sum of $28,100.28 attorney fees and expenses, entering a judgment in favor of the Plaintiff Zoldessy accordingly.[1]

The Defendant, Founders Title Company, appealed to the Court of Appeals for the Eleventh Circuit, and that Court ruled that the District Court erred in charging the jury that the Statute of Limitations began to run on the RICO claim after commission of the last predicate act (mail fraud or wire fraud); holding that the general federal rule, which provides that the Statute of Limitations begins to run when a Plaintiff knows or should know of the injury, applies in Civil RICO cases. The Court of Appeals then reviewed the facts of the case and concluded that Zoldessy learned that he "had been deceived" by mid-January, 1982, and that he did not file suit until late March, 1983. Thereupon, the Court of Appeals ruled that the Zoldessy claim was time-barred and vacated his judgment.[2] On this decision, its mandate issued to the District Court[3] in response to which the District Court withdrew its award of attorney fee and expenses.[4]

Plaintiff timely filed his Petition for Rehearing pursuant to FRAP 40, setting out in detail his position, which, summarized briefly, covered three basic points of error he contends the Court of Appeals committed, as follows:

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[1] See Memorandum Opinion of District Court (Appendix A) and Judgment of District Court (Appendix B).

[2] See Decision of Court of Appeals (Appendix C)

[3] See Judgment and Mandate (Appendix G)

[4] See Memorandum Opinion and Order of District Court of January 6, 1986, (Appendix H)

1. The Court took facts which applied only to Harold Williams and incorrectly applied them to Plaintiff Bernard Zoldessy.

2. The issue of fact upon which a determination of when the limitation period would expire was for the Jury and the Judgment should not have been vacated.

3. The Court misapplied the federal law presently in effect, as to the time the Statute of Limitations begins to run as it relates to the Zoldessy RICO claim.

The Court of Appeals thereafter denied Plaintiff Zoldessy's Petition for Rehearing.

ARGUMENT

The Petitioner seeks review on Writ of Certiorari for three basic reasons:

1. The federal Court of Appeals has decided an important question of federal law which has not been, but should be decided by this Court.

2. The federal Court of Appeals has rendered a decision in conflict with the decisions of other federal Courts of Appeals on the same subject matter.

3. The federal Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to effectively deprive the Plaintiff Zoldessy of his right to a trial by jury under Amendment VII of the United States Constitution.

1. An important question of federal law which has not been, but should be decided by this Court.

The trial of civil RICO claims has been on the increase in recent years, and while this Court has reviewed substantive questions in connection with such claims, it has not rendered a decision which would establish definite authority as to when a cause of action accrues and thus when the Statute of Limitations commences to run.

This is evidenced in *Compton v. Ide,* 732 F.2d 1629 (9th Cir., 1984) where the Court said:

> "We have found no authority definitely deciding when a cause of action accrues alleging a RICO violative civil conspiracy. As previously discussed, the general federal rule is that the limitations period begins to run when the plaintiff knows or has reason to know of the injury which is the basis for his action. *Trotter v. International Longshoremen's and Warehousemen's Union Local 13, et*

al, 704 F. 2d 1141, 1143 (9th Cir. 1983); *Cline v. Brusset,* 661 F. 2d at 110."

The absence of any ruling of this Court as to the time the Statute of Limitations will begin to run is also apparent in *A. B. Alexander v. Perkin Elmer Corporation,* 729 F. 2d 576 (8th Cir., 1984). There the Eighth Circuit Court of Appeals addressed the question by adopting the most appropriate Missouri state statute as to the limitation period and applying case precedent from the Missouri Court of Appeals as to the commencement of the cause of action, ruling that:

> "The effect of the statutory provision just quoted [516.120(5)] is to give plaintiffs five years to sue from the date when they knew or should have discovered the controlling facts" (citing *Harding v. Modern Income Life Insurance Co.,* 593 S.W. 2d 568, 571 (1979).

A number of Circuit Courts of Appeals, including the Circuit from which this review is sought, have adopted the position that although federal courts look to state law to determine the applicable limitations period, the question of when a cause of action accrues, and thus when limitations period commences to run, is governed by federal law. *Vigman v. Community National Bank & Trust Co., et al.,* 635 F.2d 466 (1981) (5th Cir.); *Cline v. Brusett, et al.,* 661 F.2d 108 (1981) (9th Cir.); *Trotter v. International Longshoremens and Warehousemen's Union Local 13, et. al.,* 704 F. 2d 1141 (1983) (9th Cir.); *Compton v. Ide* (Supra). However, there is no uniform federal law laid down by the Supreme Court to govern this important question and the various circuit courts of appeals have relied on what they characterize as the general federal rule.

Trotter v. International Longshoremen's and Warehousemen's Union Local 13, et al. (Supra) states:

> "The general federal rule is that a limitations period begins to run when the plaintiff knows or has reason to know of

the injury which is the basis of the action. (Citing *Boag v. Chief of Police* 669 F.2d 587, 589 (9th Cir., 1982); *Cline v. Brusett* (Supra); *Bailey v. California,* 560 F.2d 849, 855 (9th Cir. 1977).

The general federal rule cited above is derived from an assortment of cases dealing with various types of actions, such as fraud (*Alexander v. Perkin Elmer Corporation* (Supra), securities violations (*Vigman v. Community National Bank & Trust Co.* (Supra), civil rights violations (*Cline v. Brusett* (Supra), Labor-Management Reporting and Disclosure Act *(Trotter v. International Longshoremen's and Warehousemen's Union Local 13, et al.* (Supra), and others.

In most of the cases, the "general federal rule" laid down by the Circuit Courts of Appeals fixes the running of the Statute to commence "when the Plaintiff knows or should know of *the injury* which is the basis of his action (emphasis supplied) [see *Cline v. Brusett* (Supra); *Trotter v. International Longshoremen's and Warehousemen's Union Local 13, et al.* (Supra); *Compton v. Ide* (Supra)]. Other cases citing the general rule use different terms, such as holding that the Statute runs "from the date when they knew or should have discovered *the controlling facts".* (Emphasis supplied) (*Alexander v. Perkin Elmer Coporation* (Supra); or, that the Statute runs from the date the Plaintiff had knowledge, actual or constructive of "*the facts* forming the basis of his cause of action" (Emphasis supplied) (*Vigman v. Community National Bank & Trust Co.* (Supra). As may be readily seen, there is a need to set a clear standard for determining the commencement time for the accrual of a RICO claim.

2. **The Eleventh Circuit ruling is in conflict with other courts of appeals rulings on the same subject matter.**

If there is any uniformity, it is that discovery of the *injury* would trigger the running of the Statute.

It is at this point that the Eleventh Circuit Court of Appeals in the instant case is in conflict with a number of other federal courts of appeals decisions. While the Court correctly cites the law as being that the Statute runs from the time the Plaintiff discovers his injury, it in fact ruled in Zoldessy's claim that the Statute began to run from the date the Plaintiff "learned he had been *deceived*" (Emphasis supplied). (See Appendix C, Page 181, of the report). The Court then proceeded to find as a matter of law and fact that the Plaintiff learned he had been deceived in mid-January, 1982, a fact which appears nowhere in the Record; but, to the contrary, the Record affirmatively shows that Zoldessy's discovery of his *injury* in the loss of the sale of his farm came in May, 1982 (Rec. 293), and his discovery of his *injury* that there was no viable earnest money in Founders' possession did not come until early 1983 (Rec. 298). The Record clearly shows a continued pattern of acts of concealment on the part of co-conspirator Buderus into May, 1982 (Rec. 293, 295, 296), which effectively forestalled any need for Zoldessy to make demand upon Founders for the earnest money, having previously been assured by Founders that "we have the funds to back up the draft" (Rec. 289). If the *deceit* cloaks the injury then, as the rule properly states, the Statute should commence to run only when that cloak is lifted and the injury discovered. In sum, the Court of Appeals, in its Opinion (Appendix C, at Page 180 of the report) stated:

> "We thus follow the Eighth and Ninth Circuits. *Alexander v. Perkin Elmer Corp.,* 729 F.2d 576 (8th Cir.1984), and *Compton v. Ide,* 732 F.2d 1429 (9th Cir.1984), in holding that the general federal rule, which provides that the statute of limitations begins to run when a plaintiff knows or should know of the injury, applies in civil RICO cases. This is consistent with our practice in related fraud and securities cases. See *Hadra v. Herman Blum Consulting Engineers,* 632 F. 2d 1242 (5th Cir.1980); and *Vigman v. Community Nat'l Bank & Trust Co.,* 635 F.2d 455 (5th Cir. 1981)."

An examination of the *Alexander* and *Compton* cases cited by the Court as supporting its position reveals that there are substantial differences between those decisions and the case at bar. In *Alexander,* the Court applied the state law to both the length of time the limitation was to run and the commencement time of the Statute, where in the instant case, the Court takes the position that *federal* law applies to the commencement time. Further, in *Alexander,* the Court "judged the facts under the standards appropriate for summary judgment", that is, the evidence without contradiction established the claim to be time-barred as a matter of law (citing *Butler v. MFA Life Insurance Company,* 591 F.2d 448, 451 8th Cir. (1979). This is far from the circumstance in the Zoldessy case where the Record is clear that the injury perpetrated by Defendant Buderus, co-conspirator with Defendant Founders, was not known until May, 1982, and the injury perpetrated by Defendant Founders was not known until early 1983.

In *Compton v. Ide* (Supra), the Ninth Circuit case relied on by the Court of Appeals in its opinion, the rule is clearly stated to be that the limitation statute begins to run when the Plaintiff knows of the "injury which is the basis of his action". On the contrary, the Court in the instant case rules that the period begins to run when the Plaintiff "knew of the deception". There are many deceptions reflected in the Record, but the *injury* which is the basis for Zoldessy's action against Founders Title was that Founders did not have funds to back up the time drafts they were holding as represented to Zoldessy, and he did not know of that injury until early 1983. The civil remedy section of the RICO statute, 18 USC 1964(c), permits suits by persons injured in their business or property. These provisions focus on injury rather than on a deception or conspiracy or some other aspect of wrong-doing; and the key question must be when the *injury* was discovered.

3. The federal Court of Appeals has so far departed from the usual and accepted judicial proceedings as to deprive the Plaintiff Zoldessy of a jury trial to which he is entitled.

This case was heard in the District Court before a jury and the Zoldessy claim was submitted to the jury to determine the facts. The Court charged the jury as to the RICO claim that the Statute of Limitations for RICO claims is one year, and "the time period begins to run at the time of the commission of the last act of mail fraud or wire fraud pursuant to the enterprise alleged by the plaintiff". The jury thereupon found a verdict for the Plaintiff.

The Court of Appeals found that the District Court erred in this charge; that the time in fact began to run "when the plaintiff knows or should know of the injury". At that point, the usual and accepted procedure would have been to reverse the District Court and remand the case for a new trial, incorporating the correct charge. However, the Court of Appeals went further and ruled that Zoldessy learned he had been deceived by mid-January, 1982, and, thereupon, vacated his claim. It thus invaded the province of the Jury in this cause, denying Plaintiff a Jury trial under the changed standard.

It is not known how the Court could conclude that Zoldessy learned he had been deceived by mid-January, 1982, as the Record does not reflect this. It can only be assumed that the Court misapplied to Zoldessy facts which were true of Williams.

If there had been any evidence to support the Court's finding of this fact, it would be a question for the trier of the facts to determine and not the Court of Appeals. For the Court to assume such facts on review would effectively abridge Zoldessy's right to a jury trial under Amendment VII of the United States Constitution.

Moreover, it was early ruled in *Birmingham Bond & Mtg. Co. v. Lovell,* 81 F.2d 590 (5th Cir., 1936) that it is clearly the pro-

vince of the jury to resolve the conflict in the evidence and to determine whether, on all the evidence, the Statute of Limitations created a bar to the action. Likewise, it is well settled in Alabama law that when there is evidence reasonably affording an inference as to whether a Plaintiff was defrauded and, if so, when the Plaintiff discovered the fraud, the case is one for the trier of fact. *Mitchell Homes, Inc. v. Tew,* 294 Ala. 515, 319 So.2d 258 (1975)

The question of whether a party discovered or should have discovered fraud earlier, thus tolling the Statute of Limitations, is one properly left to the jury. *Sims v. Lewis,* 374 So. 2d 298 (Ala.1979). Also, the case of *Ryan v. Charles Townsend Ford, Inc.,* 409 So. 2d 784 (Ala. 1981) makes it clear that where there is a dispute between the parties as to the date of discovery in an action for fraud, there is a genuine issue of fact to be decided by a trier of fact.

The Seventh Amendment forbids Appellate Judges to sit as posttrial assessors, and denies them power to vacate awards because they might as fact triers have decided differently (*Budge v. Post,* 643 F.2d 372 (5th Cir., 1981), *Dunn v. Sears Roebuck & Co.,* 639 F.2d 1171, 1175 (5th Cir., 1981)

CONCLUSION

For the reasons above set out, Petitioner respectfully submits that a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 82-680-N

Umphrey H. Bowling, Jr., and Harold Williams,
Plaintiffs,

vs.

J. R. Buderus; Buderus Family Trust; Founders
Title Company, a corporation,
Defendants.

Civil Action No. 83-H-993-N

Bernard Zoldessy,
Plaintiff,

vs.

J. R. Buderus; The J. R. Buderus Family Trust;
Founders Title Company, a corporation,
Defendants.

MEMORANDUM OPINION

(Filed April 4, 1984)

The jury verdicts in these cases being of a rather unusual nature, the Court issues this opinion as an explanation of the totals assessed in the judgments.

1. **Umphrey H. Bowling, Jr.:** The jury awarded $25,000.00 against defendant Founders Title and $175,000.00 against the Buderus defendants. The evidence was such that the Buderus defendants must be jointly liable for any damages assessed against defendant Founders. Thus, the Buderus defendants and Founders are jointly liable for $25,000.00, and the Buderus

defendants are liable for $150,000.00. The jury also found that all of the damages assessed against Founders were attributable to RICO violations, and $100,000.00 of the damages assessed against the Buderus defendants. Again, the Buderus defendants would be jointly liable for the damages against Founders, so all defendants would be liable for $25,000.00 in RICO damages, trebled to $75,000.00, and the Buderus defendants would be liable for the remaining $75,000 in RICO damages, trebled to $225,000.00. The Buderus defendants would be liable for an additional $75,000.00, representing the total $150,000.00 awarded solely against them minus $75,000.00 already accounted for as RICO damages, for a total of $300,000.00 against the Buderus defendants.

2. **Harold Williams:** The jury awarded plaintiff Williams only RICO damages against Founders, in the sum of $25,000.00, trebled to $75,000.00. The jury awarded him $200,000.00 against the Buderus defendants, half as RICO damages. Thus, the Buderus defendants are liable to Williams for $100,000.00 trebled plus $100,000.00 not trebled, for a total of $400,000.00. Of this amount, $75,000.00 would represent the amount on which the Buderus defendants are jointly liable with Founders, leaving $325,000.00 on which only the Buderus defendants are liable.

3. **Bernard Zoldessy:** The jury awarded plaintiff Zoldessy only RICO damages against Founders, in the sum of $25,000.00, trebled to $75,000.00. The jury awarded him $777,707.77 against the Buderus defendant, of which $100,000.00 represents RICO damages and $677,707.77 non-RICO damages, for a total of $977,707.77. Of this amount, the Buderus defendants are jointly liable with Founders for $75,000.00, and the Buderus defendants are solely liable for the remaining $902,707.77.

4. **Founders Title Company:** The jury having returned verdicts against Founders only on Plaintiffs' RICO counts and plaintiff Bowling's fraud counts, Founders would have no right

to indemnification from the Buderus defendants. Thus, Founders cannot recover on its cross-claims. All parties have conceded that the earnest money time drafts are worthless, and, therefore, Founders is free to dispose of the drafts.

DONE this 4th day of April, 1984.

/s/ Truman Hobbs
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 83-H-993-N

Bernard Zoldessy,
Plaintiff,

vs.

J. R. Buderus; The J. R. Buderus Family Trust;
Founders Title Company, a corporation,
Defendants.

JUDGMENT

(Filed April 4, 1984)

On the 29th day of March, 1984, after this cause had been submitted to a jury, verdicts were returned by said jury as follows:

(1) "We, the Jury, find the issues in favor of the plaintiff, Bernard Zoldessy, and against defendant(s) as indicated below, on plaintiff's claims under the Racketeering Influenced Corrupt Organizations Act, and we find that the following amount(s) constitute(s) injury to business or property within the meaning of that Act (check one or both):

(X) Buderus & Trust *$100,000.00*
(X) Founders *$25,000.00*

"This the 29th day of March, 1984.

/s/ David Jones
FOREPERSON"

and

(2) "We, the Jury, find the issues in favor of the plaintiff, Bernard Zoldessy, and against the defendant(s) indicated

below: (please check one or both), and assess damages as indicated:

(X) J. R. Buderus and Buderus Family Trust, *$777,707.77.*

"This the 29th day of March, 1984.

/s/ David Jones
FOREPERSON"

Therefore, it is the ORDER, JUDGMENT, and DECREE of the Court that Bernard Zoldessy have and receive of defendants J. R. Buderus, the J. R. Buderus Family Trust, and Founders Title Company, jointly and severally, the sum of $75,000.00; and of defendants J. R. Buderus and the J. R. Buderus Family Trust, jointly and severally, the further sum of $902,707.77.

It is further ORDERED that defendant Founders Title Company have and recover nothing on its cross-claim against defendants J. R. Buderus and the J. R. Buderus Family Trust.

It is further ORDERED that defendant Founders' motion for default judgment on its cross claim against the Buderus defendants is hereby denied.

It is further ORDERED that defendant Founders Title Company have and receive no releif on its counterclaim and cross-claim for interpleader.

It is further ORDERED that the court costs incurred in this proceeding be and they are hereby taxed against defendant, for all of which execution may issue.

DONE this 4th day of April, 1984.

/s/ Truman Hobbs
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 84-7311, 84-7312, 84-7470 and 84-7471

Umphrey H. Bowling, Jr., Harold Williams,
Plaintiffs-Appellees,

vs.

Founders Title Company, a corporation,
Defendant-Appellant.

Bernard Zoldessy,
Plaintiff-Appellee,

vs.

Founders Title Company,
Defendant-Appellant.

Umphrey H. Bowling, Jr.; Harold Williams,
Plaintiffs-Appellees,

vs.

J. R. Buderus; Buderus Family Trust,
Defendants.

Founders Title Company,
Defendant-Appellant.

Bernard Zoldessy,
Plaintiff-Appellee,

vs.

J. R. Buderus, The J. R. Buderus Family Trust,
Defendants,

Founders Title Company,
Defendant-Appellant.

October 15, 1985.

Appeals from the United States District Court for the Middle District of Alabama.

Before VANCE and JOHNSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

JOHNSON, Circuit Judge:

This is a consolidated action in which the plaintiffs, real estate brokers Umphrey Bowling and Harold Williams and landowner Bernard Zoldessy, sued the Founders Title Company of California seeking damages for fraud, breach of contract and civil RICO violations in certain land transactions. At trial, the jury found Founders liable to all three plaintiffs on the civil RICO counts, and to Bowling for common law fraud. We AFFIRM Bowling's civil RICO and fraud awards and VACATE Williams' and Zoldessy's civil RICO judgments. We REMAND the award of attorney's fees to the district court for modification in conformance with this opinion.

I. Facts.

J.R. Buderus, a resident of California, conveived of an elaborate plan through which he hoped to profit from the sale of large amounts of farm land in the Southeast United States. In order to begin the acquisition, he contacted several real estate brokers working in Alabama and Florida, including plaintiffs Umphrey Bowling and Harold Williams. One of the tracts that they recommended to Buderus belonged to plaintiff Bernard Zoldessy. Buderus visited Alabama on several occasions to inspect the land.

The sales agreements that the parties entered into were unusual because they required Buderus to make no actual payment of funds prior to closing. Instead, Buderus used an instrument known as an "Earnest Money Time Deposit" as security. The instrument was in essence a promise to pay money from a specified source at a later date. Buderus represented that the in-

strument was commonly used in California and was backed by a certificate of deposit. The "funds" provided by Buderus, time drafts amounting to more than $770,000, were to be used as liquidated damages in the event of a breach of the sales contract.

Buderus placed the contracts and the time draft instruments in escrow with Founders Title Company of California. All three plaintiffs called Founders Title between August and October of 1981 to check on Buderus' reliability. A branch manager of Founders, John Nohrden, told each of the plaintiffs that he had known Buderus for about 15 years and that he was an honorable and wealthy man. Evidence at trial also suggested the Nohrden told the callers that time drafts were valid devices in California, and that Buderus' drafts were backed by adequate funds. Founders also mailed receipts to the plaintiffs when Buderus placed additional time draft instruments in the escrow account.

The sales fell through after Buderus came to the conclusion that he would not be exempts from the reporting requirements of the Interstate Land Sales Disclosure Act. Buderus wrote to all the brokers and sellers on November 30, 1981, to inform them that he was terminating the sales agreement. At the same time, however, he made telephone calls to each of the plaintiffs assuring them that the letters only applied to other deals and that he would perform his sales agreement with them. In December 1981, Bowling wrote Zoldessy that the sale was "dead" and urged him to sue Buderus. Zoldessy wrote to Founders demanding that the time drafts remain in the escrow account. On January 19, 1982, Founders informed Williams that there was no money to back up the time drafts in the escrow account. Williams knew with certainty at that point that he had been deceived.

The damage to Williams and Bowling caused by the collapse of the sales agreement was the loss of more than $300,000 in brokers' fees they would have received. Zoldessy lost more than

$1,000,000 because of a decline in land prices between the time that Buderus agreed to buy the land and the time that it was sold to another buyer. If the time drafts in the escrow accunt had had any value, the plaintiffs could have divided the $775,000 in liquidated damages among themselves.

The plaintiffs in this case brought suit against Buderus and Founders Title Company, alleging breach of contract, fraud, civil RICO violations, and conspiracy to violate RICO. After the court granted partial summary judgment to the plaintiffs, striking Founders' defense based on the California statute of frauds because Alabama law rather than California law governed the case, the case proceeded to trial. At the close of trial, the defendants moved for directed verdict and the court denied the motion except for Williams' common law fraud claim, which was barred by the statute of limitations. The court submitted special verdict forms to the jury and the jury returned verdicts in favor of all three plaintiffs.

II. Discussion.

On appeal, Founders Title Company raises four objections to the decision of the court below. Appellants argue (1) that the civil RICO claims of Williams and Zoldessy are barred by the statute of limitations; (2) that the three plaintiffs cannot recover under RICO because they do not show "racketeering injury" or criminal conviction for the predicate acts; (3) that the common law fraud judgment in favor of Bowling should be set aside on jurisdictional and choice of law grounds; and (4) that the attorney's fee awards should be reversed. We examine each argument in turn.

A. RICO claims.

At trial, the jury found that appellants violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. § 1961 *et seq.* ("RICO"), by committing the predicate acts of wire

fraud (misrepresenting the reliability of Buderus by phone) and mail fraud (mailing misleading receipts to plaintiffs), and by conducting a racketeering enterprise (the title company business). Under the provisions of Section 1964(c) the jury awarded damages of $25,000 (trebled to $75,000) to each plaintiff.

1. Statute of limitations.

When it passed RICO, Congress chose not to specify a period of limitation. Under such circumstances, federal courts must apply the most closely analogous state statue of limitations. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462, 95 S.Ct. 1716, 1721, 44 L.Ed.2d 295 (1975). The parties agree with the district court that the appropriate period here is one year, following Alabama's fraud statute. However, although state law specifies the duration of the limitations period, federal law determines the date on which that period begins. *Rawlings v. Ray*, 312 U.S. 96, 61 S.Ct. 473, 85 L.Ed. 605 (1941). Here, the district court instructed the jury that the statute began to run after the commission of the last predicate act (mail fraud or wire fraud) — and thus, the jury found that none of the claims of the three plaintiffs was barred. Founders argues on the contrary, that a RICO claim accrues when a plaintiff either knows or should know that he or she has sustained an injury.

We agree with Founders. We thus follow the Eighth and Ninth Circuits, *Alexander v. Perkin Elmer Corp.*, 729 F.2d 576 (8th Cir. 1984), and *Compton v. Ide*, 732 F.2d 1429 (9th Cir. 1984), in holding that the general federal rule, which provides that the statute of limitations begins to run when a plaintiff knows or should know of the injury, applies in civil RICO cases. This is consistent with our practice in related fraud and securities cases. *See Hadra v. Herman Blum Consulting Engineers*, 632 F.2d 1242 (5th Cir. 1980); and *Vigman v. Community Nat'l Bank & Trust Co.*, 635 F.2d 455 (5th Cir. 1981).

In this case, Bowling was aware that the transaction had fallen through by December 1981; he filed his complaint in September of 1982, less than one year later and within the statute of limitations. Thus, Bowling's claim is not barred. However, Williams and Zoldessy learned that they had been deceived by mid-January 1982, yet neither filed suit until late March 1983. The RICO claims of Williams and Zoldessy are thus time-barred. The judgments in their favor on these claims are vacated.

2. Racketeering injury.

Appellants argue that Bowling cannot recover civil RICO damages because he had not proved so-called "racketeering injury" — that is, injury from the pattern of racketeering proscribed by RICO, as distinct from that inflicted by the predicate offenses. This requirement, borrowed from the Second Circuit, *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482 (2d Cir. 1984), is difficult to define and — in part for that reason — has caused considerable dispute among the circuits. The concept derives from the reluctance of some courts to extend RICO to ornidary fraud and breach of contract cases (as opposed to the racketeering activity of organized crime, toward which it was arguably directed).

The Supreme Court granted *certiorari* in *Sedima* to resolve the conflict. In *Sedima, S.P.R.L. v. Imrex Co., Inc.*, ____ U.S. ____, 105 S.Ct. 3275, 87 L.Ed.2d ____ (1985), the Court reversed the Second Circuit, holding that a plaintiff is not compelled to show "racketeering injury" to make out a civil RICO claim. We are thus satisfied that the district court's analysis was correct and that appellee Bowling's RICO judgment survives this hurdle.

3. Criminal conviction for predicate acts.

Appellants again rely on the Second Circuit's *Sedima* decision to argue that in making out his civil RICO claim Bowling was

required — and failed — to prove that Founders was criminally convicted for the predicate acts. In reversing the latter decision, the Supreme Court examined this argument and squarely rejected it: "We can find no support in the statute's history, its language, or considerations of policy for a requirement that a private treble damages action under § 1964(c) can proceed only against a defendant who has already been criminally convicted. To the contrary, every indication is that no such requirement exists." *Id.*

Thus, in sum, Bowling's RICO judgment stands.

B. Fraud claims.

At trial, the jury held Founders liable to Bowling for common law fraud. Founders challenges this judgment on two grounds.

1. Personal jurisdiction.

Founders argues that the fraud judgment is invalid because the company lacked the minimum contacts necessary to establish personal jurisdiction in the Middle District of Alabama. Founders' contacts with Alabama consisted of several phone calls and the mailing of receipts to the plaintiffs, and the knowledge that Buderus was buying land in the state.

In assessing whether personal jurisdiction is proper, this Court asks whether the defendant "has purposefully availed himself of the benefits and protection of the forum state's laws, whether the forum state has any special interest in exercising jurisdiction, and whether the convenience of the parties favors litigating in another state." *Austin v. North American Forest Products,* 656 F.2d 1076, 1089 (5th Cir. 1981). To determine whether there has been purposeful availment of a state's laws, the court further inquires whether the defendant had a "deliberate" or merely a "fortuitous" contact with the state.

We find that Founders' contacts in the present case, although admittedly few, were deliberate and knowing. Founders agreed

to act as escrow agent for Buderus, whom it knew was purchasing large quantities of land in Alabama — thus, appellant was well aware of the *situs* of the scheme. Although the phone calls were initiated by the plaintiffs, Founders knowingly gave them information (via Nohrden, a company officer) to induce them to sell the land. Founders also mailed receipts to the plaintiffs in Alabama. These contacts were directly connected to the cause of action in this case. Further, Founders is by no means unsophisticated or parochial: it is an established commercial entity that regularly conducts interstate business. Thus, there is no unfair surprise in the maintenance of this suit in Alabama. In short, Founders was well acquainted with the players and the plot, the Alabama setting, and the importance of its own well-rehearsed, albeit supporting, role in this scheme. The district court's exercise of personal jurisdiction here does not offend due process.

2. Choice of law.

Founders argues that, under Alabama choice of law rules, Bowling's pendent common law fraud claim should be governed by California rather than by Alabama substantive law. This would be to Founders' advantage, since this claim would be barred under California law by the statute of frauds.

However, the district court was correct to apply Alabama substantive law. Alabama choice of law principles in tort and fraud look primarily to the law of the state where the injury occurs — in this case, Alabama. *Pound v. Gaulding,* 237 Ala. 387, 187 So. 468 (1939). Further, in cases involving land transfers, the law of the state in which the land is located governs. *Griese-Traylor Corp. v. First Nat'l Bank,* 572 F.2d 1039 (5th Cir. 1978).

Thus, Bowling's fraud judgment stands.

C. Attorney's fees.

The district court awarded attorney's fees in the amount of $25,000 each to Bowling and Williams and $28,100.28 to Zoldessy on the civil RICO claims. These awards are REMANDED to the district court for modification in conformance with this opinion.

AFFIRMED in part, VACATED in part & REMANDED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7311 & 84-7470
84-7312 & 84-7471

Umphrey H. Bowling, Jr.,
Harold Williams,
Plaintiffs-Appellees,

v.

Founders Title Company,
a corporation,
Defendant-Appellant.

Bernard Zoldessy,
Plaintiff-Appellee,

v.

Founders Title Company,
Defendant-Appellant.

Appeal from the United States District Court for the
Middle District of Alabama

ON PETITION(S) FOR REHEARING

(November 19, 1985)

BEFORE: VANCE and JOHNSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellee, Bernard Zoldessy, is denied.

ENTERED FOR THE COURT:

Johnson, United States Circuit Judge

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NOS. 84-7311, 84-7312, 84-7470 and 84-7471

Umphrey H. Bowling, Jr.,
Harold Williams,
Plaintiffs-Appellees,

v.

Founders Title Company, a
corporation,
Defendant-Appellant.

Bernard Zoldessy,
Plaintiff-Appellee

v.

Founders Title Company,
Defendant-Appellant.

Umphrey H. Bowling, Jr.,
Harold Williams,
Plaintiffs-Appellees,

v.

J. R. Buderus: Buderus Family
Trust,
Defendants,

Founders Title Company,
Defendant-Appellant.

Bernard Zoldessy,
Plaintiff-Appellee,

v.

J. R. Buderus, The J. R. Buderus
Family Trust,
Defendants.

Founders Title Company,
Defendant Appellant.

On Appeal From The United States District Court
For The Middle District Of Alabama
Northern Division

NOTICE OF APPEAL
TO THE UNITED STATES SUPREME COURT

Notice is hereby given that Bernard Zoldessy, Plaintiff-Appellee above named, hereby appeals to the United States Supreme Court from the Judgment entered in this action by the United States Court of Appeals for the Eleventh Circuit on the 15th day of October, 1985, and from the Order of said Court denying the Petition for Rehearing of the Plaintiff-Appellee Bernard Zoldessy, issued on November 19, 1985.

This Appeal is taken under the provisions of 28 USC 1254(1) and 2101(c).

HUGH A. LLOYD
LLOYD, DINNING, BOGGS &
DINNING
P.O. Drawer Z
Demopolis, Alabama 36732

Attorneys for Bernard Zoldessy,
Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Notice of Appeal upon Honorable Robert A. Huffaker, Attorney for Appellant Founders Title Company, P. O. Box 270, Montgomery, Alabama 36195, and Honorable Frank W. Riggs, Attorney for Appellee Umphrey Bowling, Jr. and Harold Williams, P. O. Box 1047, Montgomery, Alabama 36102 and Honorable Wayne P. Turner, Attorney for Appellee Umphrey H. Bowling, Jr. and Harold Williams, 428 South Lawrence Street, Montgomery, Alabama 36014, by mailing a copy of same to them, postage prepaid, this 4th day of February, 1986.

Hugh A. Lloyd
Of Counsel

APPENDIX F

Section 6-2-39 of the Code of Alabama, 1975

§ 6-2-39. Same — One year.

(a) The following must be commenced within one year:

(1) Actions for malicious prosecution;

(2) Actions for seduction;

(3) Actions qui tam or for a penalty given by statute to the party aggrieved, unless the statute imposing it prescribes a different limitation;

(4) Actions of libel or slander; and

(5) Actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section; and

(6) All actions for the recovery of wages, overtime, damages, fees or penalties accruing under laws respecting the payment of wages, overtime, damages, fees and penalties.

(7) All actions commenced to recover damages for injury to the person or property of another wherein a principal or master is sought to be held liable for the act or conduct of his agent, servant or employee under the doctrine of respondeat superior.

(8) All actions commenced under section 6-5-411 to recover damages for injury or damage to property of a decedent.

(b) If any action is commenced before the time limited has expired, judgment is entered for the plaintiff and such judgment is arrested or reversed on appeal, the plaintiff or his legal representative may commence an action again within one year

from the reversal or arrest of such judgment though the period limited may in the meantime have expired; and in like manner, if more than one judgment is arrested or reversed, an action may be recommenced within one year. (Code 1852, § 2481; Code 1867, § 2905; Code 1876, §§ 3231, 3235; Code 1886, §§ 2619, 2623; Code 1896, §§ 2806; Code 1907, §§ 4840, 4845; Code 1923, §§ 8949, 8959; Acts 1935, No. 357, p. 780; Code 1940, T. 7, §§ 26, 26(1), 35; Acts 1943, No. 394, p. 363; Acts 1956, 1st Ex. Sess., No. 113, p. 170; Acts 1957, No. 544, p. 765, § 2.)

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7311

D.C. Docket No. 82-0680

Umphrey H. Bowling, Jr.,
Harold Williams,
Plaintiffs-Appellees,

v.

Founders Title Company,
a Corporation,
Defendant-Appellant.

No. 84-7312

D.C. Docket No. 83-993

Bernard Zoldessy,
Plaintiff-Appellee,

v.

Founders Title Company,
Defendant-Appellant.

No. 84-7470

D.C. Docket No. 82-0680

Umphrey H. Bowling, Jr.,
Harold Williams,
Plaintiffs-Appellees,

v.

J. R. Bunderus,
Bunderus Family Trust,
Defendants,

Founders Title Company,
Defendant-Appellant.

No. 84-7471

D.C. Docket No. 83-993

Bernard Zoldessy,
Plaintiff-Appellee,

v.

J. R. Bunderus, The J. R.
Buderus Family Trust,
Defendants,

Founders Title Company,
Defendant-Appellant.

Appeals from the United States District Court for the
Middle District of Alabama

Before VANCE and JOHNSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby, AFFIRMED in part and VACATED in part; and that these causes be and the same are nereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that plaintiffs-appellees, Harold Williams and Bernard Zoldessy, are to bear their own costs on appeal; and that defendant-appellant pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: October 15, 1985
For the Court: Spencer D. Mercer, Clerk

By: Warren A. Godfrey
Deputy Clerk

ISSUED AS MANDATE: Dec. 3, 1985

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 82-680-N

Umphrey H. Bowling, Jr.;
et al
Plaintiffs

v.

J. R. Buderus; et al
Defendants

Civil Action No. 83-H-993-N

Bernard Zoldessy
Plaintiff

v.

J. R. Buderus; et al
Defendants

MEMORANDUM OPINION AND ORDER

(Filed Jan. 6, 1986)

These cases are now before the Court for further proceedings consistent with the mandate entered herein by the Court of Appeals for the Eleventh Circuit on December 3, 1985, and for consideration of plaintiff Williams' motion to dismiss without prejudice, filed November 14, 1985. Upon consideration of the opinion and mandate of the Eleventh Circuit in these cases, the Court is now of the opinion that plaintiffs Williams and Zoldessy should not have been awarded attorneys fees under the terms of 18 U.S.C. § 1964(c).

Accordingly, it is ORDERED, ADJUDGED and DECREED that the memorandum opinion and judgments entered by this Court on June 29, 1984 are hereby withdrawn insofar as attorney fees were awarded to plaintiffs Williams and Zoldessy.

The Court now will consider the motion to dismiss filed by plaintiff Williams. At the close of trial on March 29, 1984, Williams received a jury verdict of $25,000 (trebled to $75,000) against all defendants on his civil RICO claim. However, the Court of Appeals for the Eleventh Circuit vacated the judgment in favor of Williams, holding that the applicable Alabama statute of limitations had expired on his claim. Williams now asks this Court to dismiss his case without prejudice so that he may refile his lawsuit in Florida, where the applicable statute of limitation apparently has not run, and where plaintiff is a resident citizen.

Generally, a dismissal on the basis of a statute of limitation bars only the remedy and not the claim. 1B *Moore's Federal Practice* ¶ 0.409[6], at 335 (2d ed. 1984). Thus, a "dismissal on the ground of a time bar establishes that the action cannot be brought again in a jurisdiction in which the statute is applicable, but it does not adjudicate the merits of the controversy or the issue of whether it is time barred in another jurisdiction." 1B *Moore's Federal Practice* ¶ 0.409[6], at 339 (2d ed. 1984). The Restatement of Judgments § 49, comment a, at 194-95 (1942) clearly states this principle:

> [I]f the plaintiff brings an action to enforce a claim in one State and the defendant sets up the defense that the action is barred by the Statute of Limitations in that State, the plaintiff is precluded from thereafter maintaining an action to enforce the claim in that State. He is not, however, precluded from maintaining an action to enforce the claim in another State if it is not barred by the Statute of Limitations in that State.

Because an action brought in another jurisdiction will not be barred automatically by res judicata, Professor Moore suggests that the original action should be dismissed without prejudice to plaintiff's right to sue in another jurisdiction. See 1B *Moore's Federal Practice* ¶ 0.409[6], at 341-42 (2d ed 1984); *cf. Titus v. Wells Fargo Bank and Union Trust Co.*, 134 F.2d 223 (5th Cir. 1943) (remanded to dismiss without prejudice "if it is so advised"). Professor Moore further states that *Stokke v. Southern Pacific Co.*, 169 F.2d 42 (10th Cir. 1984) stands for the proposition that a plaintiff whose case is time barred has a *right* to a dismissal without prejudice. 1B *Moore's Federal Practice* ¶ 0.409[6], at 341-42 n. 31 (2d ed. 1984).

If a plaintiff is entitled to a dismissal without prejudice where he carelessly files suit after the statute of limitations has clearly expired, as in *Stokke,* certainly he should be entitled to a dismissal without prejudice where the issue is so close that a district court after a careful consideration of the law erroneously allows the case to go to trial. Plaintiff should not be penalized for the mistake of the Court.

This Circuit appears to be in accord with this view. In *Titus v. Wells Fargo Bank & Union Trust Co.*, 134 F.2d 223 (5th Cir. 1943), plaintiff brought a diversity suit in Texas to enforce two contracts made by the defendants. The Texas statute of limitations clearly barred the action. However, the district court determined that the statute of limitations had been waived by agreement and allowed the case to go to trial. In the *Titus* case, as in the instant case, the plaintiff prevailed at the trial level. On appeal, the Fifth Circuit found that the agreement to waive the statute was against public policy and unenforceable in Texas and remanded the case for further proceedings "including the right of plaintiff, if it is so advised, to dismiss its suit without prejudice," because "a judgment which denies relief, merely because such a statute [of limitation] has run against the claim, determines only that no action may be brought on that claim in that state. It does not and cannot determine that an action may

not be maintained on the contract in another state." *Titus*, 134 F.2d at 224. *Titus* apparently remains binding authority in this circuit. *See Henson v. Columbus Bank & Trust Co.*, 651 F.2d 320, 324-25 (5th Cir. 1981). Plaintiff Williams argues that a dismissal without prejudice is not unduly prejudicial to defendant because Williams was only one of three plaintiffs in the instant suit, and he will be only one of several plaintiffs in the Florida action. This Court understands *Titus* to make it irrelevant that plaintiff was only one of several plaintiffs in this Court and may well be only one of several plaintiffs in a Florida action. Accordingly, it is

ORDERED that plaintiff's motion to dismiss without prejudice to his right to refile his lawsuit in another jurisdiction is granted.

DONE this 6th day of January, 1986.

Truman Hobbs
United States District Judge